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IN THE

Supreme Court of the United States

October Term, 1941—No. ~~000~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,

Respondents.

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY COHEN,
LUDWIG M. WILSON,
SIDNEY BARROWS,
Counsel for Respondents Giovanni del Drago and Marcel del Drago.

Hallsby Press Inc.—New York City

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IN THE

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October Term, 1941—No. 980

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,

Respondents.

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement.

When Congress in 1916 imposed a federal death duty, it selected the estate tax, which falls upon the estate as such without recourse to the beneficiaries. And as the result of debate upon the bill as originally proposed, Congress included in the law what is now section 826-b of the Internal Revenue Code, in which Congress directed how the tax shall fall. It has since rejected proposals that it alter the nature of the tax so as to apportion the burden among the beneficiaries, and it has authorized apportionment of the tax as to insurance monies only. The reasons why Congress had and maintains this intention are matters of record (p.

9 *et seq.*). Since New York Decedent Estate law section 124 seeks to change the incidence of the tax and to apportion it among the beneficiaries, the court below has found section 124, together with the allied section 249-t of the New York Tax Law, unconstitutional. 287 N. Y. 61 (R. 91-104).

Questions Involved.

The underlying legal issue is the asserted violation of the Supremacy Clause of the Federal Constitution (Art. VI, cl. 2). Its determination requires only the application of settled principles. The only question upon which this Court has not directly passed is as to the meaning of section 826-b in the light of its extended legislative history—a meaning correctly found in the court below (R. 95-6).

A subsidiary question arises but only upon the assumption that section 826-b does not fix the incidence of the tax. Upon this question the court below ruled that only the express assent of Congress would enable New York to disturb the uniform incidence of the federal tax which, it is accepted, falls even without the express command of section 826-b upon the estate as such and not upon the beneficiaries (R. 100-101).

Petitioner's assertion that the decision carries serious consequences to "carefully made plans" of many persons (Petition, p. 8), should be measured in the light of the fact that section 826-b (as well as section 124 of the New York Decedent Estate Law) authorizes the testator to fix the incidence of the tax. It is quite unusual that a Will disposing of substantial assets does not explicitly fix the incidence of all taxes. The least experienced of draftsmen today writes a tax clause in a Will as quickly as he provides for payment of debts and funeral expenses; only the draftsman's blunder (as we believe occurred in the present case) affords occasion for application of section 124.

Responsible opinion has differed as to whether the incidence of the federal tax, admittedly upon the residue of the estate and not upon the legacies, is fair. But only the petition charges (p. 12) that the decision of the Court of Appeals reaches "absurd" results. The opinion of the New York State Decedent Estate Commission which recommended section 124 as part of New York's new estate tax in 1930 is at variance with the views of the draftsman of the federal estate tax law, Mr. Cordell Hull (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657 *infra* p. 11 *et seq.*), and at variance with views twice expressed in this Court (see *Knowlton* v. *Moore*, 178 U. S. 41 at p. 77 and 109; *Stebbins* v. *Riley*, 268 U. S. 137 at 145, per Stone, *J.*). It would seem that no single rule will do justice in all circumstances; this Court will not, if it accepts jurisdiction of this case, solve that problem.

The dictum in *Edwards* v. *Slocum*, 287 Fed. 651 (at p. 653), *per* Judge Hough, as well as the related observations upon which the petition relies so heavily (p. 9), are as plausible as they are casual, but they are in error as to the fact of Congressional intention. The considerable mass of proof that Congress was in fact concerned that the estate as such and not the beneficiaries should bear the weight of its tax was not called to Judge Hough's attention. The whole question was irrelevant to the decision of his case and was not argued by counsel.

Petitioner recognizes in Point II of the brief the issue in this case: whether in the face of the Congressional declaration in section 826-b of its purpose to fix the incidence of the tax upon the estate, New York is nevertheless competent to direct that the tax be apportioned among the legatees. The Court of Appeals did not err in deciding that the reserved power of the State over distribution of the estates of its decedents does not justify such overriding of the expressed Congressional purpose—any more, for example, than a State purporting to regulate local conditions of employ-

ment would be competent to change the incidence of the federal payroll tax.

Two proposals are before the present Congress, either of which would render academic the issue in this case.

The first proposal has wide scope. It proposes that Congress write into the federal law its own scheme for apportionment of the tax. It cannot but emphasize that the incidence of the tax is a matter for Federal regulation with which the States cannot interfere. It was advanced on behalf of the Treasury Department by Mr. Randolph Paul, Tax Adviser to the Secretary of the Treasury, in his recent statement before the House Ways and Means Committee, March 3 (Wall Street Journal, March 5, 1942, page 16, column 4) and we are informed it is now under consideration in the House Committee. Mr. Paul stated:

> "*Federal Apportionment Statute.* At the present time there is no provision apportioning the estate tax liability among the beneficiaries of the estate other than a provision relating to life insurance. There is no sound basis for having an express provision apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax. It is therefore suggested that there be incorporated in the estate tax an apportionment provision which would apportion the liability for tax in those cases in which the decedent did not himself prescribe a method of apportionment."

The other measure proposes to amend section 826-b so that it expressly authorize the States to apportion the Federal estate tax (H. R. 6257, by Representative Keogh). If either of these amendments is indeed appropriate, then Congress and not the Courts—much less the States—should dictate it (R. 103, fol. 102).

POINT I.

Congress expressed in section 826-b of the Internal Revenue Code its intention to impose its tax upon the estate and not upon any legacy.

The petitioner does not face section 826-b, although its meaning is fully expounded and reliance principally placed upon it in the opinion of Judge Rippey in the court below (R. 95-6). The section states the intent of Congress that its tax should not be a legacy or inheritance tax, but should be an estate tax with its incidence upon the estate and not upon the beneficiaries.*

Section 826-b was first proposed as an amendment in the Senate (53 Cong. Rec. 64th Cong. 1st Sess. p. 13299), doubtless as a result of the discussion in Congress as to the incidence of the tax (p. 8 *et seq., infra*). The provision immediately preceding (sec. 826-a) authorizes the collection of the tax from any property of the decedent wherever found, and section 826-b is redundant unless its purpose is to fix where the burden of the tax shall ultimately fall.

Section 826-b of the Internal Revenue Code.

Sec. 826-b. *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced

* The opinion below does not, as the petition states (p. 5), construe the section to mean that Congress had a specific intention that the tax should fall upon the *residue* of the estate. The point is rather that Congress did not want the tax to be a tax on the beneficiaries; therefore it must naturally fall on the residue.

had the tax been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, *it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.*"

First: The concluding declaration of the Congressional intent that (unless the testator otherwise direct) the tax be paid "out of the estate before its distribution" would seem unmistakable. It is not merely a regulation of the *time* when the tax must be paid. An earlier section of the law fixes the time when the tax must be paid (Internal Revenue Code, sec. 822). That section also directs that the executor pay the tax, and of course he will not do so *after* distribution.*

The purpose of this provision is rather to declare that the tax is not to be upon the beneficiaries. Thus, the testator is permitted to direct "otherwise." This cannot mean that the testator is authorized to direct that payment of the tax be postponed until after distribution of the estate. It means that he may direct that the incidence of the tax should not rest upon the estate (*i.e.* "paid out of the estate before distribution") but should be apportioned among the beneficiaries.

Second: The opening portion of the section seems equally conclusive. By regulating the questions of reimbursement and contribution, it ensures that the beneficiaries shall not bear any part of the tax. Any beneficiary is given reimbursement from the estate if he has been required to pay any part of the tax.

This direction, it should be noted, is for "reimbursement" and not merely contribution—the text of the section itself

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* The statutes are collected in the Appendix.

shows that its draftsman appreciated the distinction. And it commands reimbursement of any beneficiary if he pay "any part" of the tax—which may of course be less than what might be deemed his *pro rata* contribution of the tax.

Even if, as petitioner argues (p. 11), it were true that this State apportionment law is unconstitutional only if it "cannot be reconciled or consistently stand together" with the federal law, such repugnancy is apparent at this point. Decedent Estate Law section 124 commands that the executor paying any portion of the tax have contribution from the beneficiaries—a direct reversal of section 826-b. Would anyone maintain that if the collector had levied upon the trust for Marcel del Drago (R. 76-7) and had collected all of the tax from that source, then the rights of the trustee of that trust would be limited to contribution under Decedent Estate Law section 124 instead of full reimbursement under section 826-b?

Third: The succeeding portion of section 826-b speaks of contribution among beneficiaries. But it seems to presuppose that the tax shall nevertheless fall like "other charges against the estate," and it is addressed to less usual situations: where the estate has been distributed without payment of the tax, or where there has been no will; and, of course, where the testator has directed apportionment of the tax among the beneficiaries.

The courts which have considered the meaning of section 826-b have held that it shows the Congressional intent to place the tax upon the estate and not the beneficiaries and have refused to direct apportionment of the tax on that ground (*Matter of Oakes*, 248 N. Y. 280 at 282; *Matter of Hamlin*, 226 N. Y. 407 at p. 418; *Farmers' L. & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 495; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 367 *et seq.*; *People* v. *Pasfield*, 284 Ill. 450 at 453-4).

The ruling of Mr. Justice Cardozo in *Matter of Oakes, supra*, denying a claim for apportionment of the tax, should serve to dispose of contrary assumptions found in certain opinions upon which the petition relies (Petition, p. 8):

> "* * * The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole, and, primarily at least,* is a charge upon the residue. (Matter of Hamlin, 226 N. Y. 407.) * * *
>
> *"The command of the statute is explicit as to the incidence of the burden.* 'If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, * * * it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.' (40 Stat. 1096, 1100, c. 18, Sec. 408, Revenue Act of Feb. 24, 1919; *Farmers Loan & Trust Co.* v. *Winthrop, supra*, p. 497). *The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been modified by the will* * * *"* (at p. 282, emphasis added).

It seems more than coincidence that this declaration of section 826-b, written in the Senate, is in the language of Mr. Hull, used shortly before in describing the incidence of the tax (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657).

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* i.e., in the absence of direction in the will and not, as suggested in the dissenting opinion below (R. 107), in the absence of State regulation.

Where an intestacy, Mr. Hull observed, "the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern * *.*." And:

> "Where the decedent makes a will he can allow the estate tax to fasten on the net estate in the same manner, or if he objects to this *equitable* method of imposing it upon the *entire net estate before distribution* he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax."

Prior to the formulation in the Senate of section 826-b, question had been raised whether the bill as drawn did not permit of apportionment of the tax.*

The Reasons Motivating Congress.

We turn to the argument in the petition and the dissenting opinion below that notwithstanding section 826-b, Congress could not have had any interest in the incidence of its

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* E.g., the remarks of Rep. Dillon (53 Cong. Rec. 64th Cong. 1st Sess. Appendix at pp. 1495-6):

"If he (the executor) pays the tax no provision is made for a charge against the beneficiaries. How is he to settle the rights between numerous beneficiaries where the tax is increased in proportion to the value of the estate? If it be argued that the administrator or executor would be required to pay the tax in the first instance and then collect it from the heirs or legatees then it becomes pertinent to know in what ratio he is to assess the heirs and legatees.

* * * * *

"It seems to me that the framers of this bill have overlooked all the congressional acts heretofore passed imposing a tax upon the right of succession to property and have overlooked the fact that the tax must rest against the legatee or heir who received the distributive share of the estate. The tax not being levied on the succession to property of the decedent but on the property itself becomes a direct tax *etc.* * * *"

estate tax (R. 106; petition, p. 9). The fact is that Congress did in 1916 have such an interest, and from several aspects.

Constitutional considerations. In the elaborate opinion of Chief Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, the rule was laid down—and applied—that a tax upon a legacy measured by the size of the estate rather than by the size of the legacy, would cause such "profound inequality" as not merely to offend the Constitution, but also to "transcend the limitations arising from those fundamental concepts of free government which underly all constitutional systems" (178 U. S. at p. 77; see also p. 109; cf. *Matter of Sherman*, 179 App. Div. 497). This, in 1916 still the governing judicial pronouncement, alone explains why in that year there should have been written this explicit direction that the tax should fall on the estate rather than be apportioned among the legatees.*

Adjustment with the States. There was also the problem of reconciling any federal tax with existing State death taxes. When the proposal for a federal estate tax was made in 1916 it met with intense opposition in behalf of the States that such taxes were the prerogative of the States and that on many grounds, practical as well as theoretical, the federal government should not invade that province.** Since the

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* The constitutionality of the estate tax was indeed sustained, as against the challenge so foreshadowed in *Knowlton* v. *Moore*, upon the ground that the tax, being an estate tax, did not fall upon any of the legatees (see the opinion of Judge Mack in *New York Trust Co.* v. *Eisner*, 263 Fed. 620 at 621; aff'd 256 U. S. 345).

** See 53 Cong. Rec. 64th Cong. 1st Sess. at pp. 10659, 10730, 10731, 10752, 10761, 13043, 13044, 13060, 13098, 13130, 13188, 13191, 13192, 13297; Appendix at pp. 1403-5, 1406, 1408, 1499, 1708, 1709.

The National Tax Association had by formal resolutions since 1907 opposed a federal estate tax on this ground (Proc. Nat. Tax Cong. 1907 at p. 662; 1908 at p. 25; 1912 at pp. 176-9, 195-7).

death taxes levied by the States—42 of them—in 1916 were legacy and not estate taxes, the solution was thought to lie in a federal death tax which would be confined to the estate and which would not fall upon the legatees. The draftsmen and proponents of the federal tax said and indicated repeatedly that they considered the estate tax to be a supplement to the State legacy taxes and not a competitor.

It must be remembered that the legacy taxes imposed by the States, considered solely as a practical matter, were quite different from the estate tax. Put aside the question of the incidence of their burden—the States graduated their rates, as well as exemptions from the gross taxable amount, by the size of the individual legacy and by the relationship of the legatee to the decedent. Because of these limitations, the State taxes yielded little revenue (53 Cong. Rec. 64th Cong. 1st Sess. at p. 13103), and there was room for the view that an estate tax, since it would not take any such account of relationships but would fall on the estate alone without recourse to the beneficiaries, would not be objectionable as in conflict with the State death duties. As Mr. Hull stated when asked, perhaps facetiously, whether his bill sought to relieve taxpayers: "I was undertaking to say that it was proposed to supplement existing tax laws, in the light of their operation and effects on all the people, by

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Leading economists were also opposed—for example, Prof. C. J. Bullock: "For the federal government to enter this field would be worse than a blunder, it would be a fiscal crime" (The Position of the Inheritance Tax in American Taxation, 1 Proc. Nat. Tax. Assn., p. 240).

Some of the States also adopted resolutions in opposition, i.e. Rhode Island, Laws 1916 at p. 382; and compare the resolutions of the tax boards of California and Wisconsin at 53 Cong. Rec. 64th Cong. 1st Sess. at p. 1404 *et seq.*

this provision." (53 Cong. Rec., 64th Cong. 1st Sess. at p. 10655).*

Mr. Hull made another and more explicit statement to the same effect. He asserted that there was no conflict with any State system. He stated his underlying conception that the estate tax "should be combined with a well balanced system of share taxes when viewed as a permanent tax measure" (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657) and he applied it so:

> "The effect of the rates carried in the pending estate tax bill when considered as a supplement to our State taxes on shares of estates will not be unjust or unreasonable; on the contrary, the State laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. *The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation*" (p. 10657).

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* The statement of Rep. Kitchen, Chairman of the House Committee, illuminates this understanding (compare the position taken in the dissenting opinion below that his words show indifference to the incidence of the tax—R. 105) (53 Cong. Rec. 64th Cong. 1st Sess. Appendix p. 1942):

> "Mr. Cox. Does the gentleman recall how his tax rates compare with the inheritance tax rates in the State of New York?
>
> Mr. Kitchen. No; I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."

Mr. Hull reiterated these views in 1918 (56 Cong. Rec. 65th Cong. 2nd Sess. at p. 10167; *cf.* his statement in 1927, 69 Cong. Rec. 70th Cong. 1st Sess. at p. 635; see, also, Proceedings of National Conference on Inheritance and Estate Taxation, Feb. 1925, p. 105).

The Committee in charge of the bill made the same point (House Rep. No. 922, Committee on Ways and Means, 64th Cong., 1st Sess., p. 5):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax *upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.*
>
> "'The Federal estate tax recommended forms a *well-balanced system* of inheritance taxation as between the Federal Government and the various States * * * '".

(See also the extended remarks of Rep. Kitchin at Cong. Rec., id., p. 10596.)*

This conception of the federal estate tax as complementary to the State legacy taxes rests on sound economic theory (E. R. A. Seligman, Address at Nat. Conf. on Inheritance and Estate Taxation on Feb. 10, 1925—Report of Proceed-

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* The structure of the bill as originally proposed (without section 826-b) confirms the thought. Every previous federal death tax had made specific provision for payment of the tax by the legatees and not by the estate (30 Stat. 448, 464-6 (June 1898) as amended 31 Stat. 946 (1901); 13 Stat. 223, 285-7, 287-91 (July 1864); 12 Stat. 432, 485-6 (July 1862); 1 Stat. 527 (July 1797)). Similarly the English estate tax laws, which furnished the model for the original draft of this bill for a federal estate tax, apportioned the tax (Finance Act, 57 & 58 Vict., c. 30 Secs. 9(4) and 14(1)). But all such provisions were omitted from the draft of the federal tax in 1916—because it was desired that the tax should not be apportioned.

ings, pp. 59-60). And this conception *requires* that the estate tax fall on the estate without recourse to the beneficiaries. Such is the purpose of section 826-b.

It is not an answer, that these reasons underlying section 826-b may not survive today. The section itself is a part of existing law, and "It is quite inadmissible to assume that Congress exerting federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions as to State power which were not rendered until several years later" (*Burnet* v. *Brooks*, 288 U. S. 378 at 389). The statute must of course be interpreted "in the light of the circumstances as they existed when the statute was passed" (*Louisville & Nevada R. R. Co.* v. *Mottley*, 219 U. S. 467 at 474).

Subsequent History.

There has been continuous pressure in Congress which would alter the incidence of the estate tax. In 1918-19 there was an unsuccessful attempt to substitute a new death tax under which the tax would specifically fall on the legacies (65th Congress, 3rd Session, H. R. Rept. No. 1037, pp. 70 *et seq.*) Contemporary evidence is that one of the purposes was to remove the incidence of the estate tax from the residue.*

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* The Survey, November 23, 1918—"Mrs. Sage's Will and the Federal Estate tax", by Robert W. DeForest. The author, after referring to the fact that the charities who were residuary legatees under Mrs. Sage's will bore the entire tax on her large estate (*cf. Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61), stated:

> "Undoubtedly it is this consideration which has led the Finance Committee of the Senate to propose an amendment to the tax bill already adopted by the House whereby the Federal estate tax shall hereafter be imposed on individual legacies and not on the estate as such, and it is earnestly to be hoped that if any estate tax remains in the present revenue bill it shall be imposed in this way."

One change was, however, effected in 1918. Section 826(c) of the Internal Revenue Code was added to the law. It directs that the tax attributable to the proceeds of insurance policies be apportioned among the beneficiaries of the insurance (40 Stat. 1097, 1100; see H. R. No. 767, 65th Congress, 2nd Session, page 22 *et seq.*). It directs an order of reimbursement directly contrary to that directed in Section 826(b)—it provides that the executor shall have reimbursement from the beneficiary. In this respect it is identical with Decedent Estate Law section 124. But there is the vital difference that it was Congress—and not New York— which saw fit to alter the incidence of its tax, and moreover only to this limited extent. As Chief Justice Rugg said in *Bemis* v. *Converse*, 246 Mass. 131, at 134:

> "The presence of this provision indicates that no further apportionment was intended by Congress."

In 1921 renewed suggestions for the substitution of a legacy tax for the Federal estate tax were considered and rejected (61 Cong. Rec. 67th Cong. 1st Sess. at pp. 6922, 5839-40).

Again in 1924 an effort to substitute a legacy tax was made (65 Cong. Rec. 68th Cong. 1st Sess. at pp. 8034 *et seq.*, 8037). Specific provision was proposed, as in Decedent Estate Law section 124, for reimbursement of the executor by the legatees (proposed section 310(a)). One of the stated reasons* for this proposal was that the incidence of the existing estate tax, upon the residue, was considered objection-

* Senator Walsh of Massachusetts, 65 Cong. Rec., 68th Cong. 1st Sess. at page 8039:

"The estate tax is not a fair tax. Being imposed on the total amount of the estate, it ordinarily is paid out of the residuary estate, not out of any particular legacy. The residuary legatee rather than the estate is the real taxpayer. All other beneficiaries ordinarily escape. This frequently works great hardship, and usually is contrary to the decedent's wish. The residue is frequently the bulk of the estate, passing to the

able. The Senate adopted the proposal, but it failed in conference (65 Cong. Rec. 68th Cong. 1st Sess. at p. 9536). A similar proposal was again made and rejected in 1935 (79 Cong. Rec. 74th Cong. 1st Sess. at pp. 12301, 13074).

Petitioner's Contentions.

Petitioner seeks (p. 17), to dismiss section 826-b as a redundant procedural regulation. We think its history and its analysis shows that it expresses the will of Congress as to where the burden of its tax shall fall.

Petitioner points instead with important emphasis to section 812-d of the Internal Revenue Code although in the courts below he did not refer to that provision until his motion for reargument in the Court of Appeals.

The provision was not adopted until 1924 (Revenue Act of 1924, sec. 303(a)(3). Prior rulings had allowed deduction from the decedent's gross taxable estate of any sum willed to charity (i.e. *Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61; *Union of New Haven Trust Co.* v. *Eaton*, 20 Fed. (2d) 419; *Howard T. Walter*, 2 B. T. A. 453 at 457;

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nearest and most beloved of the testator. • • • The inheritance tax I propose is broken up among the various beneficiaries, as it should be, and no one beneficiary of the estate is forced to pay for the transfer to all the beneficiaries. There need be no forced sales of property in the estate, for each beneficiary has the privilege of paying the tax on his share outright.

Again, the estate tax results in situations the decedent could not have intended. Thus, in Y. M. C. A. against Davis, decided February 18, 1924, by the Supreme Court, a testator left her residuary estate to the Y. M. C. A. and certain other benevolent organizations. The executor brought an action to determine whether the tax should be paid out of the residue which was given to these benevolent organizations or out of the various specific legacies. The court properly held under the law that the tax would be payable out of the residue, thereby greatly reducing the amount received by these charitable, educational, and religious organizations. Obviously, we should avoid this result if we can, and it can be avoided. Each beneficiary should pay his own transfer tax. It is wrong for the residuary legatee, often a charity, or the chief object of the decedents' bounty, to have to pay the taxes for the whole estate."

Matter of Colonial Trust Co., 19 B. T. A. 174). The single purpose of section 812-d was to limit that deduction to the amount actually received by charity—that is, after payment of the taxes of a State or any subdivision however imposed or divided and of the Federal government.

The several careful analyses of the history of the section intimate no other purpose—certainly none to affect the incidence of the tax (Commerce Clearing House Federal Tax Service, 1942, Par. 3526 *et seq.*, Prentice-Hall Federal Tax Service, 1942, Vol. 3, Pars. 23,401, 23,407 *et seq.*, Alexander Tax Service, Vol. 1, Par. 4108). The provision is a standard one, found in most death tax laws and in which the language could not possibly have the meaning now sought to be ascribed to it as authorizing the States to apportion the tax (i.e., N. Y. Tax Law, Section 249-s (3)). Its point is simply that any deduction made from the amount given to charity, whatever the source, must be accounted for in determining the exemption from tax.

The provision was not part of the federal estate tax from 1918 to 1924, and it was again omitted during 1926 to 1932. At best it would have afforded singularly intermittent regulation of the incidence of the tax. The truth is that petitioner's argument would have section 826-b repealed by the most devious implication from section 812-d.

POINT II.

The State of New York is without power to interfere with the incidence of the Federal Estate Tax.

First. Petitioner argues that Decedent Estate Law section 124 does not offend the Supremacy Clause even though section 826-b be construed "as definitely fixing for the purpose of the federal statute the incidence of the tax". It is maintained that the power of the State over distribution of prop-

erty at death may override the federal declaration as to how the federal tax on that property shall fall. Presumably petitioner would also maintain that New York in *the exercise of the same power* could thrust the federal tax upon charity though Congress command that the charity be not taxed.

Many authorities in addition to *Irving Trust Co.* v. *Day* (brief for pet., p. 19) expound the extent of the power of a State over distribution of estates. The majority below took full notice of them (i.e., *Mager* v. *Grima*, 8 How. (U. S.) 490, cited in the opinion below at R. 99 and 109). But none of them involve any question of a conflict with a federal command in a field in which Congress is competent to command, such as with respect to the incidence of its own tax. On the contrary, it is clear that because of the Supremacy Clause—State inheritance laws are subordinate to supervening federal treaties which affect inheritances in the States (*Santovincenzo* v. *Egan*, 284 U. S. 30 at 40; *Nielson* v. *Johnson*, 279 U. S. 47).

Other familiar decisions similarly limit this power of the States over inheritances where it is employed so as to tax extraterritorial values, thus impairing the design of the federal system (*Frick* v. *Pennsylvania*, 268 U. S. 473 at 495; T. R. Powell, Abolition of the Federal Inheritance Tax, printed in 67 Cong. Rec. 69th Cong. 1st Sess. at p. 3797 (1926); cases cited in *Burnet* v. *Brooks*, 288 U. S. 378 at 401 *et seq.*). The controlling principle is that the "most characteristic" of reserved State powers, even such as in the local administration of the estates of its decedents or with respect to the jurisdiction of its own courts, may not be exercised so as to frustrate any federal purpose (*Burnes Nat'l. Bank* v. *Duncan*, 265 U. S. 17, especially at p. 24 per Mr. Justice Holmes; compare *Terral* v. *Burke Constr. Co.*, 257 U. S. 529).

The federal power to tax at death and to fix the incidence of its tax is not subordinate to any State power. It has been authoritatively pointed out that the field of the federal

death tax is at least as broad as that of the States (T. R. Powell, Extra Territorial Inheritance Taxation, 20 Col. Law Review 1, at 19-21). Both State and Nation may function concurrently in this field. Here in truth are *co-ordinate* powers under our federal system. The States have no standing to regulate, much less to infringe upon, the functioning of the federal tax power.

Petitioner's alternative claim (Point III, pp. 20-1) is that the State is competent either to dictate how the testator shall draw his Will, or to interpret it, and may therefore fix for him the incidence of the tax. We do not recognize in this a different contention. If the State may not overrule Congress in the guise of exercising authority over the distribution of estates, it may not claim that power by virtue of its authority over the making of or interpretation of wills.

The remaining contentions rest upon interpretation of section 826-b which deny its meaning as we have presented it (Point I, *supra*).

Second. Petitioner suggests that section 826-b is "incomplete" as to the ultimate incidence of the tax—that is, that it merely directs how the tax should normally fall without at the same time inhibiting the States (pp. 17-18). The answer would seem to be that by section 826-b Congress nevertheless preempted the field concerned with the incidence of its tax. Even on the assumption stated, the section is certainly legislation in the field of the incidence of the tax—a field which has been under continuous reconsideration and where Congress has refused to alter that incidence except in one specific area (sec. 826-c). The States are therefore not free to impose their own contrary views as to what the incidence should be.

If Congress were tomorrow to add to its estate tax law a formula for apportioning the tax among the legatees (a

matter now under consideration for the pending tax bill, p. 4, *supra*), then Decedent Estate Law sec. 124 would doubtless be conceded to be ineffective. In that situation the asserted supremacy of the State power would be clearly seen to be without basis. The matter ought not to be less clear where Congress, after stating in 1916 its desire that the tax be paid out of the estate before distribution, has agreed to change the incidence thus fixed in only one limited area. In either case the field is occupied to the exclusion of the States.

Third. Petitioner also argues that the federal law is "silent" as to the "ultimate incidence" of the tax (pp. 18-19). This view of section 826-b requires a brief statement as to the sense in which the court below made its reference to the Uniformity Clause (R. 101-2, 104). The court held Congressional silence would not authorize State action here, but that express Congressional assent to such action would be essential before New York could disturb the nationwide and uniform incidence of the federal estate tax or any other similar national law.

The federal estate tax is a self-contained system which operates uniformly and without assistance or participation by the States. If each State were free to impose what it considers a fair system of apportioning the federal tax, diversity would ensue "as various and as numerous as the States" (*Easton* v. *Iowa*, 188 U. S. 220, 229).* In these circumstances the doctrine is that without express Congressional assent, New York may not even *supplement* the operation of the federal tax law,—much less fix its incidence in a manner in which the tax would not otherwise fall.

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* The experience of New York under Decedent Estate Law section 124 is that its appearance of simplicity is deceptive and that the matter of apportioning the federal estate tax in the manner there directed is enormously complicated (see E. G. Greeley, Estate Tax Apportionment in New York Journal of Accountancy, Oct. 1940).

Many recent decisions illustrate this, i.e., *Burnet* v. *Harmel*, 287 U. S. 103, where the question was whether State law could determine what is income for purposes of the federal tax. This Court held (p. 110):

> "Here we are concerned * * * with the * * * exercise of its plenary power (of Congress) to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. * * * State law may control only where the operation of the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

(See also *Flaherty* v. *Hanson*, 215 U. S. 515; *United States* v. *Snyder*, 149 U. S. 210 at 214; *Lyeth* v. *Hoey*, 305 U. S. 188; *Hines* v. *Davidowitz*, 312 U. S. 52.)

Also illustrative are the decisions forbidding State interference with or supplementation of the working of the federal banking system (*Farmer & Mechanics Nat. Bank* v. *Deering*, 91 U. S. 29, at 34; *Easton* v. *Iowa*, 188 U. S. 220, especially at pp. 238-9); with the bankruptcy system (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265; *Kalb* v. *Feuerstein*, 308 U. S. 433 at 439); with other federal powers such as over Indian affairs (*In re Heff*, 197 U. S. 488 at 508-9) or the maintenance of veterans' homes (*Ohio* v. *Thomas*, 173 U. S. 276); compare *Johnson* v. *Maryland*, 254 U. S. 51; *United States* v. *Owlett*, 15 Fed. Supp. 736; *In re Leaken*, 137 Fed. 680);—or indeed with the federal judicial system (Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345).

CONCLUSION.

This case involves the interpretation of section 826-b of the Internal Revenue Code in the light of its background and its history subsequent to enactment. Once that question is determined, only routine application of the principles of law established under the Supremacy Clause is required. As a practical matter, the issue in this case arises in narrow and unusual circumstances. The question whether to apportion the burden of its tax is one for adjustment by Congress alone, which now has it under consideration.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY COHEN,
LUDWIG M. WILSON,
SIDNEY BARROWS,
Counsel for Respondents Giovanni del Drago and Marcel del Drago.

Appendix.

INTERNAL REVENUE CODE SEC. 826. COLLECTION OF UNPAID TAX.

(a) *Sale of Property.*—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement Out of Estate.*—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of Life Insurance Beneficiaries.*—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

INTERNAL REVENUE CODE SEC. 822. PAYMENT OF TAX.

(a) *Time of Payment.*

(1) *General Rule.*—The tax imposed by this subchapter shall be due and payable fifteen months after the decedent's death.

(2) *Extension of time.*— * * *

(b) *Liability for Payment.*—The tax imposed by this subchapter shall be paid by the executor to the collector.

INTERNAL REVENUE CODE SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate.

(a) *Exemption.*—An exemption of $100,000;

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(d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational pur-

poses, * * * If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

NEW YORK DECEDENT STATE LAW §124. APPORTIONMENT OF FEDERAL AND STATE ESTATE TAXES; EXECUTOR OR ADMINISTRATOR TO DEDUCT TAXES FROM DISTRIBUTIVE SHARES

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law,[1] or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted,[2] upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit

of each such person bears to the total value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount

of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty. Added L. 1930, c. 709.

NEW YORK TAX LAW §249-t. JURISDICTION OF THE SURROGATE.

1. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent which estate is subject to tax under this article, or to appoint a trustee of such estate, or any part thereof, or to grant ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, including specifically, but without limitation, jurisdiction to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided * * *.